Re-drawing existing powers over natural resources for food security at the light of a natural resources constrained world

Claire Malwé, Edgar Fernandez-Fernandez

RE-DRAWING EXISTING POWERS OVER NATURAL RESOURCES FOR FOOD SECURITY AT THE LIGHT OF A NATURAL RESOURCES CONSTRAINED WORLD*

Claire MALWE,
Chercheur invité au Collegium de Lyon,
Maître de conférences à l'Université de Rennes 1,
Institut du Droit Public et de la Science Politique (EA 4640)

et **Edgar FERNANDEZ FERNANDEZ**
Chercheur invité au Collegium de Lyon,
Chercheur associé à l'Institut Ouest : Droit et Europe - Université de Rennes 1

Introduction*

Food security[1] is inextricably dependent both on the availability and on the access to natural resources necessary for food production (land, water, seeds and others). The availability of these resources is in turn inevitably linked to the capacity of the Earth to produce food, and thus to the maintenance of the Earth's life-support systems. However, the maintenance of this capacity and of the systems on which it depends is clearly endangered by human activities[2] and by the current forms of using natural resources. In this way, UNEP[3] talks about "*the current resource crisis*" to refer to the problem of overconsumption and unsustainable use of natural resources that has resulted in that "*resource exploitation already exceeds the Earth's biological capacity by 25%*"[4].

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[1] According to Paragraph 1 of the World Food Summit Plan of Action (1996) (http://www.fao.org/docrep/003/w3613e/w3613e00.HTM, viewed on July 22, 2013), "*food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and health life*".

[2] See BARNOSKY Anthony D., *et. al.*, *Scientific Consensus on Maintaining Humanity's Life-support Systems in the 21st Century: Information for Policy Makers*, http://mahb.stanford.edu/wp-content/uploads/2013/05/Consensus-Statement.pdf, viewed on July 5, 2013, and BARNOSKY Anthony D., *et. al.*, "Approaching a state shift in Earth's biosphere", *Nature*, Vol. 486, June 7, 2012, p. 52-58. http://www.stanford.edu/group/hadlylab/_pdfs/Barnoskyetal2012.pdf, viewed on July 5, 2013.

[3] United Nations Environment Programme.

[4] UNEP, "Introducing the Resource Panel: Rationale and Work Programme". http://www.unep.org/resourcepanel/Portals/24102/PDFs/Introduction_to_the_Resource_Panel.pdf, viewed on June 6, 2013. According to Jim LEAPE, Director General of WWF International, "*we are using 50 per cent more resources than the Earth can provide, and unless we change course that number will grow very fast – by 2030, even two planets*

In addition, while natural resources are crucial for food security, FAO notices that "*conflicts and competition over access to, and the use of these resources are likely to increase in many regions, due to soaring demands for food, fibre, energy as well as the loss and degradation of productive land. These conflicts will be exacerbated by changing growing conditions, increased water scarcity, loss of biodiversity, extreme weather events and other effects of climate change*"[5].

In a recent interview[6], José Graziano Da Silva, FAO's Director General, affirmed that "*the World's food production is already sufficient to feed correctly the whole population*", and that "*the greatest threat for food security is the lack of access to resources*". Nevertheless, the question of food production in sufficient quantity and quality to feed correctly the World's population today brings to the table other concerns related to the way natural resources are used and will be used for this objective: not only natural resources have to be managed in order to meet present and future demands for food, but also food has to be produced in a way as to guarantee the availability of natural resources, in sufficient quantity and quality, for meeting other basic human needs, as for example living in a healthy environment.

Therefore, natural resources and their services stand at the crossroads between food, agricultural and environmental issues[7]. Because they are essential both for maintaining the Earth's life-support systems and for satisfying basic human needs[8], natural resources constitute a crosscutting element and a central point of nowadays regional and international agendas (on climate change, biological diversity, food security, trade, etc.)[9]. For this reason,

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will not be enough". WWF, *Living Planet Report 2012: Biodiversity, biocapacity and better choices*, 2012, p. 6. http://awsassets.panda.org/downloads/1_lpr_2012_online_full_size_single_pages_final_120516.pdf, viewed on July 22, 2013.

[5] FAO, "Natural Resources and Environment: About the NR Department". http://www.fao.org/nr/aboutnr/en/, viewed on July 18, 2013.

[6] "Interview de José GRAZIANO DA SILVA directeur général de la FAO « Produire plus avec moins »", *Sciences au Sud : le journal de l'IRD*, n° 69, avril-mai 2013, p. 1 et 16. http://www.ird.fr/la-mediatheque/journal-sciences-au-sud/les-numeros-de-sciences-au-sud/n-69-avril-mai-2013, viewed on July 19, 2013.

[7] According to FAO, "*Natural resources and their services are essential to food production, enhanced rural development and sustainable livelihoods*". FAO, *op.cit.*

[8] "*People have basic needs for food, water, health, and a place to live, and additionally have to produce energy and other products from natural resources to maintain standards of living that each culture considers adequate. Fulfilling all of these needs for all people is not possible in the absence of a healthy, well-functioning global ecosystem*". BARNOSKY Anthony D., *et. al.*, *Scientific Consensus on Maintaining Humanity's Life-support Systems in the 21st Century: Information for Policy Makers*, *op.cit.*

9 While the actual international governance system is fragmented, and economic, environmental and social issues are isolated one from another, natural resources problematic is calling for a global and transversal approach. As Professor François COLLART DUTILLEUL underlined it, "*in late 2009, the future of natural resources was decided in three international negotiations directly or indirectly dealing with food natural resources: WTO negotiation on agricultural products trade in Geneva in December, FAO's on food safety in November in Rome, and the one on global warming in Copenhagen in December. Yet, these three meetings failed and none of them has come to an end so far*". According to this author, this failure was inevitable because they were dissociated: "*it makes no sense to buffer the free natural resources exploitation in Copenhagen if their free trade is promoted in Geneva at the same time. This promotion itself is pointless if the goal is to reach a food safety goal in the long run. This food safety has no future if what is distinctly discussed in Rome is neglected in Copenhagen*". COLLART DUTILLEUL François, "Law devoted to food issues and natural resources exploitation and trade", http://www.droit-aliments-terre.eu/documents/sources_lascaux/articles/2011/FCD_ENSLyon_05_2011_EN.pdf, viewed on July 9, 2013.

they can act as the converging point and a starting point for putting all these agendas together[10].

Natural resources' management brings up important questions about the allocation of legal powers in our societies. Especially, one main question is to know which forms of legal powers should be exercised on these resources while keeping in mind and pursuing both fundamental objectives of maintaining life-support systems and satisfying basic human needs.

During the 1960s, the expansion of the principle of permanent sovereignty resulted in the "nationalizing" of natural resources law. Since then, domestic legislation is crucial for the maintaining and management of such resources. However, current legal principles and rules are the inheritance of that time in which Man thought himself finite in a world endowed with infinite resources. For this reason, it is now time to re-draw the rules concerning the allocation of legal powers over natural resources at the light of a resource-constrained world.

I - Re-examining the principle of State sovereignty over natural resources

During the twentieth century, an enormous expansion of the principle of State sovereignty took place[11]. The United Nations was the birthplace of this principle and the main forum for its development and implementation. Relevant resolutions were first adopted by the General Assembly in the fifties. But it is General Assembly resolution 1803 (XVII) in 1962 that gave to this principle a recognition under international law during the decolonization process[12]. However, given that the UN members had not yet become aware of the finished character of natural resources, resolution 1803 did not include any rules limiting the use of natural resources for protecting its stock.

According to Nico Schrijver, the principle of permanent sovereignty has been progressively recognized as giving rise to a series of resource-related rights as the right:

"*1. to possess, use and freely dispose of its natural resources, though with the qualification under modern international law that this applies as long as a State is possessed of a government representing the whole people belonging to the territory as the 1970 Declaration on Principles of International Law puts it;*

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[10] See The Michel Serres Institute Webpage ("The Institute missions" http://michelserresinstitute.ens-lyon.fr/, "Credo" http://michelserresinstitute.ens-lyon.fr/spip.php?rubrique32, and "Resources" http://michelserres institute.ens-lyon.fr/spip.php?rubrique3, viewed on July 8, 2013).

[11] About the history of this expansion, see SCHRIJVER Nico, *Sovereignty over Natural resources: balancing rights and duties*, Cambridge University Press, 1997. The United Nations has adopted more than 80 resolutions relating to permanent sovereignty over natural resources, and the principle has been incorporated into a number of multilateral and international treaties and declarations. For example, in environmental declarations: Principle 21 of the Stockholm Declaration (1972) and Principle 2 of the Rio Declaration (1992): "*States have, in accordance with the Charter of The United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own policies*". Article 15.1 of the Convention on Biological Diversity (1992): "*Recognizing the sovereign rights of States over their natural resources (…)*".

[12] http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803%28XVII%29, viewed on July 10, 2013. In this important resolution, the General Assembly declared: "*The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned*."

2. to determine freely and control the prospecting, exploration, development, exploitation, use and marketing of natural resources;

3. to manage and conserve natural resources pursuant to national developmental and environmental policies;

4. to regulate foreign investment, including a general right to admit or to refuse the admission of foreign investment and to exercise authority over the activities of foreign investors, including the outflow of capital; and

5. to nationalize or expropriate property, of both nationals and foreigners, subject to international law requirements" [13].

Since the 1960s, "*developing countries actively pursued the implementation of the principle of permanent sovereignty over natural resources because they perceived this to be a main basis for their economic development and for a redistribution of wealth and power in their relations with the industrialized world*"[14]. Consequently, the meaning of the principle has been durably shaped by this close relation with economic development[15].

Even though more recently the principle of permanent sovereignty has been profoundly impacted by the development of international environmental law[16], the absence of detailed provisions delineating States' duties means that natural resources may be utilized in ways that affect the maintenance of life-support systems and compromise the satisfaction of basic human needs[17]. Consequently, in spite of the influence of international environmental law, a remaining crucial issue is to re-draw the principle of sovereignty so that it clearly includes the obligation for the States to use, develop and protect natural resources in a way that enables achieving these goals.

The principle of sovereignty should also be re-analyzed in the context of the situation of the States in regard to the rules of international law. International trade law and investment law clearly "*favours the freedom of choice productions, the free flow of investments and the free movement of goods by empowering private operators. These rules deprive governments of the ability to adjust local, regional or national production (what is produced from natural resources) to meet populations needs, but are also preventing States to oppose those rules in*

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[13] SCHRIJVER Nico, *op.cit.*, p. 391. For a complete review of the "*birth and development of the principle*", *Ibid.*, part 1 p. 33-164.

[14] *Ibid.*, p. 82.

[15] In this sense, while recognizing the principle of permanent sovereignty over natural resources in its resolution 1803 (XVII) in 1962, the General Assembly recalled that she attaches "*particular importance to the question of promoting the economic development of developing countries and securing their economic independence*" and noted that "*the creation and strengthening of the inalienable sovereignty of States over natural wealth and resources reinforces their economic independence*".

[16] According to Nico SCHRIJVER, "*the rapid development of international environmental law has had a profound impact on the interpretation of the principle of permanent sovereignty over natural resources in modern international law. While main elements of the principle have been reaffirmed and consolidated in various international environmental instruments, the corollary duties with respect to nature conservation and environmental protection are receiving increasing emphasis. Hence, permanent sovereignty serves no longer merely as the source of every State's freedom to manage its natural resources, but also as the source of corresponding responsibilities requiring careful management and imposing accountability at national and international levels*". SCHRIJVER Nico, *op.cit.*, p.392-393.

[17] BARNES Richard, *Property Rights and natural resources*, Hart Publishing, Oxford, 2009, p. 232.

a binding and significant way"[18]. Impacts of free trade agreements over the management of natural resources at a domestic level can be illustrated through the analysis of the Dominican Republic - Central America Free Trade Agreement (CAFTA). In CAFTA's Chapter 17 on "*Environment*", countries agree to ensure that their laws and policies provide for and encourage high levels of environmental protection, to continue to improve those laws and policies and to not fail to effectively enforce them. They also agree no to waive or derogate from them in order to encourage trade or investment[19]. However, under Article 17.13 "*Definitions*", it is specified that "*for the purpose of this chapter (…) "**environmental law"** does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, **of natural resources***". Consequently, CAFTA provisions implicitly open the possibility of lowering the level of natural resources' protection for facilitating their exploitation.

In the centre of this confrontation between international law and national rules, the principle of sovereignty might also be invoked against the rules of international trade and investment. Consequently, further studies should precisely analyze to what extent the principle of sovereignty could act as a legal tool in favour of States' room for manoeuvre in the implementation of domestic legal solutions for maintaining life-support systems and satisfying basic human needs of the population.

II - Re-examining property rights over natural resources

Nowadays, in the "western world", the right of property is considered as the dominant legal form of power over natural resources. Current legal documents reflect the western interpretation of the rule. For example, Article 21 of the American Convention on Human Rights ("Right to Property") reads as follows: "*1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law*". According to the Inter-American Court of Human Rights, "*Article 21 of the American Convention recognizes the right to **private property***"[20].

Despite this original limited scope of Article 21, in the case "Kichwa indigenous people of Sarayaku v. Ecuador" (Judgment of June 27, 2012), the Inter-American Court of Human Rights stated (par. 145) that "*Article 21 of the American Convention (property right)*

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[18] WEBER Jean-Louis, FERNANDEZ FERNANDEZ Edgar, MALWE Claire, SALLES Jean-Michel, COLLART DUTILLEUL François, NEGRUTIU Ioan, "A Natural Resource-Systems approach: Targeting the Ecological Transition at Regional Scale", presented in the 10th International Conference of the European Society for Ecological Economics, Lille, June 2013, to be published.

[19] CAFTA, Chapter 17 "*Environment*", Article 17.1: "*Levels of Protection*": "*Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall ensure that its laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies*".

[20] Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001 (Merits, Reparations and Costs), Paragraph 143.

protects the close relationship between indigenous peoples and their lands and with the natural resources on their ancestral territories and the intangible elements arising from these". Yet, as Frédéric Deroche underlined it[21], the relationship to the land of the native populations distinguishes itself strongly from property right. Land is not an object of appropriation and the attributes of the western property right (namely the usus, the fructus and the abusus) have no sense for indigenous populations. In spite of this obvious fact, the Inter-American Court chose to establish and base the right of the native populations over natural resources on Article 21 of the American Convention. It is more than evident, even for the Court, that the current legal language of the American Convention is insufficient to capture the various forms of relationship on natural resources that exist around the world. Aware of this incoherence, the Court declared: "*The indigenous peoples have a community-based tradition related to a form of communal collective land ownership; thus, land is not owned by individuals but by the group and their community. These notions of land ownership and possession do not necessarily conform to the classic concept of property, but deserve equal protection under Article 21 of the American Convention. Ignoring the specific forms of the right to the use and enjoyment of property based on the culture, practices, customs and beliefs of each people, would be tantamount to maintaining that there is only one way to use and dispose of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of people*"[22].

The systematic repetition of the western vision of the relationship between human-beings and land in legal documents should now be questioned and overcame[23]. In this way, the Constitutions of Ecuador and Bolivia include alternative conceptions of the relationship humanity-nature, especially those hold by indigenous communities. Also, these constitutions recognize as a main goal the "*good way of living*" ("*buen vivir*") and promote a transformation of the ends and purposes of the economic system, so that it takes into account the human dignity and the integrity of nature[24]. This is an example of how Law can serve as an instrument of transformation and redefinition of the relationship between human-beings and the natural resources on which the humanity is fully dependent. Another example of new forms of legal powers over natural resources that could be implemented and that should be the object of further studies is the "resource consents" created under the "Resource Management

[21] DEROCHE Frédéric, "Emergence d'un système de protection du rapport à la terre et aux ressources naturelles des peuples autochtones", in COURNIL Christel et COLART-FABREGOULE Catherine (dir.), *Changements environnementaux globaux et droits de l'Homme*, Bruylant, 2012, p. 511.

[22] Par. 145. In the same sense, see Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006 (Merits, Reparations and Costs), Paragraph 120, and Inter-American Court of Human Rights, *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of August 24, 2010 (Merits, Reparations and Costs), Paragraph 87.

[23] The reproduction of a western and unique model of apprehension of natural resources is mainly discussed in doctrinal fields. See GRINLINTON David and TAYLOR Prue, (ed.), *Property rights and sustainability: the evolution of property rights to meet ecological challenges*, Martinus Nijhoff, 2011, 415 p.; BARNES Richard, *op.cit.*, 472 p.

[24] CANOVAS Julie and BARBOSA Julien, "Enjeux et défis de la consécration constitutionnelle des cosmovisions autochtones dans la protection de l'environnement : regard croisés entre Bolivie et Equateur", in COURNIL Christel et COLART-FABREGOULE Catherine (dir.), *op.cit.*, p. 533.

Act" in New Zealand[25], which have been described as "*an entitlement of a new kind created as part of a system for preserving a limited public natural resource*"[26].

[25] GRINLINTON David, "Evolution, adaptation, and invention: property rights in natural resources in a changing world", in GRINLINTON David and TAYLOR Prue, (ed.), *op.cit.*, p. 275. The Resource Management Act of 1991 deals with natural resources as a whole. The management of all natural resources was brought under a single statute and under a common purpose and common principles. Of significant importance is Section 5. Paragraph 1 establishes the purpose of the RMA: "*The purpose of this Act is to promote the sustainable management of natural and physical resources*". Paragraph 2 defines what it should be understood as sustainable management for the purpose of this act:

"*In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—*

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment".

[26] *Ibid.*, p. 294 and 296. The author is quoting a case from the High Court of Australia concerning abalone fishing consents.